Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-887

In the Supreme Court

of the United States

OCTOBER TERM, 1986

LARRY W. PASSAGE, et al., Petitioners,

v.

PRUDENTIAL-BACHE SECURITIES, INC., et al.,
Respondents,

BRIEF OF RESPONDENTS, PRUDENTIAL-BACHE SECURITIES, INC., et al, RESPONDENTS

Daniel J. Shea
800 Broadway
Helena, Montana 59601
(406) 443-0219

Attorney for Respondent

16 pp

QUESTIONS PRESENTED

Before this court reaches a decision as to whether there should be review on the merits, Prudential-Bache asks this Court to determine whether the question raised by the Petitioners is properly before this Court. The question raised here by Petitioners here was not decided by either the Montana trial court or the Montana Supreme Court. Furthermore, if Petitioners did raise the question before the Montana Supreme Court, they did not preserve the question by filing a petition for rehearing and asking the Montana Supreme Court to expressly rule on this question.

If we assume the question is properly before this Court, Prudential-Bache does not agree with the question presented by the Petition. The question should be whether the Fifth Amendment Due Process Clause prevents the National Arbitration Act from being enforced if an agreement to arbitrate does not expressly set out the rights that are given up by submitting a dispute to arbitration. This Court should refuse to issue a writ of certiorari because the question raised does not present a substantial federal question.

INDEX
TABLE OF CONTENTS

QUESTIONS PRESENTED ____ i

TABLE OF CONTENTS ____ ii

TABLE OF AUTHORITIES ____ iii, iv

OPINIONS BELOW ____ 2

JURISDICTIONAL GROUPS ____ 2

STATUTORY PROVISIONS INVOLVED ____ 2

STATEMENT OF THE CASE ____ 3

(1) Clarification of the record as to whether Prudential-Bache conceded the agreements were adhesion contracts

(2) Failure to Preserve the Question Raised for Review

(a) Neither the Montana trial court nor the Montana Supreme Court ruled on the question presented to this Court in the Petition for Certiorari.

(b) If we assume the question as presented to this Court was properly raised before the Montana trial court and the Montana Supreme Court, both courts nonetheless did not rule on the issue and Petitioners failed to preserve the issue by filing a petition for rehearing asking the Montana Supreme Court to directly rule on the question.

ARGUMENT--Reasons for Denying the Writ ____ 5

(1) The question presented to this Court was not iii

directly presented to the trial court or to the Montana Court, and as a result neither the trial court nor the Montan Supreme Court ruled on the question.

(2) If we assume the question presented in the Petition for Certiorari was raised before the trial court and again before the Montana Supreme Court, the Petitioners failed to preserve the issue by asking the Montana Supreme Court through a petition for rehearing, to directly rule on the question. The result is that there is no ruling by the Montana Supreme Court on the question raised in the Petition before this Court.

(3) The question does not present a substantial federal question

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases:
Southland v. Keating, 465 U.S. 1 (1984) ——— 8

Other Sources:
Title 9, U.S.C. Section 2 ——— 2

Rule 21, rules of the Supreme Court of the United States of America ——— 5, 7

Rule 34, Montana Rules of Appellate Civil Procedure —3, 5, 8

17 C.F.R. 240.15C-2 ——— 2

No. _____

In the Supreme Court

of the United States

OCTOBER TERM, 1986

LARRY W. PASSAGE, et al., Petitioners,

v.

PRUDENTIAL-BACHE SECURITIES, INC., et al.,
Respondents,

BRIEF OF RESPONDENT PRUDENTIAL-BACHE SECURITIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Prudential-Bache Securities, Inc., respectfully prays that this court deny issuance of a writ of certiorari to review the judgement and opinion of the Supreme Court of Montana in the above matter.

JURISDICTION

Respondent Prudential-Bache agrees that the petition for certiorari was timely filed and that this court has jurisdiction under 28 U.S.C. Sec 1257 (3). We argue below, however, that the Petition for Certiorari should be dismissed.

QUESTIONS PRESENTED

Before this Court reaches a decision as to whether there should be review on the merits, Prudential-Bache asks this Court to determine whether the issue raised by the Petitioner is properly before this Court. The issue raised by Petitioners here was not decided by either the Montana trial court or the Montana Supreme Court. Furthermore, if Petitioners did raise the issue before the Montana Supreme Court, they did not preserve the issue by filing a petition for rehearing and asking the Montana Supreme Court to expressly rule on this issue.

If we assume the question is properly before this Court, we do not agree with the question presented by the Petition. The question should be whether the Fifth Amendment Due Process Clause prevents the National Arbitration Act from being enforced if the agreement to arbitrate does not expressly set out the rights that are given up by agreeing to arbitration.

STATUTORY PROVISIONS INVOLVED

We agree that Petitioners have set forth in their petition the basic statute on which arbitration turns where the transaction involves interstate commerce--9 U.S.C. 2. However, we agree with Respondents G.T. Murray & Co., et al, that the Petitioners have improperly relied on 17 C.F.R. 240.15C2-2. It has no application to this case.

Respondent Prudential-Bache also relies on Rule 34 of the

Montana Rules of Appellate Civil Procedure. It provides:

> Rule 34. Petitions for rehearing.
> When, in appeals or special proceddings, it is ordered that remittitur, peremptory writ of judgment issue forthwiht, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

STATEMENT OF THE CASE

Several matters must be cleared up regarding Petitioners' Statement of the Case. First, Prudential-Bache did not concede the agreements to be adhesion contracts. Second, in discussing the question of whether the question had been preserved for review the Petitioners" state that the trial court found that the Passages had "unknowingly" given up enormous discovery rights. There is no finding to this effect and there is not a scrap of evidence in the record that the Passages were unaware of what discovery rights they may have given up by agreeing to arbitration. Third, contrary to the assertions of the Petitioners, the question was not preserved for review either at the trial court level or before the Montana Supreme Court. Furthermore, neither court ruled on the question that is presented to this Court by the

petition for a writ of certiorari.

First, contrary to the assertion of the Petitioners, Prudential-Bache did not concede the agreements to be adhesion contracts. Petitioners cite but do not quote from the transcript (Tr. 32). In the proceedings before the trial court this counsel did indicate the agreements perhaps were of the take it or leave it kind, but qualified this statement by stating he had no experience in this area and really did not know. In concededly inartful language, I stated:

> . . . I don't really know whether Prudential or G.T. Murray or anyone else would refuse to enter into an agreement and we don't like this provision as to arbitration. I don't know--I don't have any experience. (Tr. 32)

The colloquy at page 48 of the transcript possibly supports the conclusion that the trial court believed that all the defendants had agreed the documents to be contracts of adhesion, but even the trial court was not satisfied of this fact. (Tr. 48) We emphasize this point only to establish that Prudential-Bache did not concede the documents to be contracts of adhesion.

Second, the Petitioners point of emphasizing that the trial court concluded the Passages had "unknowingly" given up enormous discovery rights, is apparently presented to this Court to support the proposition that the Passages did not understand the purport of the arbitration agreements. But there is not a scrap of evidence to support this conclusion as to the state of mind of the Passages in signing the arbitration agreements. The fact that they at no time alleged they did not read the arbitration agreements and not time alleged they did not understand the effect of the arbitration agreements, would seem to establish that they were fully aware of what they were doing when they signed the contracts.

Third, and most important on the question of whether this Court, under Rule 21, has jurisdiction to take the case on the merits and decide the question presented, the Passages are utterly wrong in asserting that they presented the question to the Montana courts and that the Montana courts decided the question. Neither the Montana trial court nor the Montana

Supreme Court decided the question presented in this Petition. For this reason the Petitioners have failed to fulfill the requirements of Rule 21 and the Petition should be dismissed.

If the question was raised in the Montana trial court it was done in such fashion that all of the opposing counsel and the trial court failed to realize that it had been raised. The question was not briefed by opposing counsel in trial court, and the trial court's opinion (see Petitioners' Appendix B, pp13-15) fails to even mention, let alone decide the question presented here.

The same is true in the proceedings before the Montana Supreme Court . The question was not squarely raised in the Passages' briefs filed before the Montana Supreme Court, and this being so, all briefs in opposition did not discuss the question now before this Court. More important, the question before this Court was not decided by the Montana Supreme Court in its opinion renderd on August 26, 1986. In fact, the issue was not even mentioned. (See opinion in Petitioners' Appendix A, pp4-7.)

Finally, the Petitioners failed to avail themselves of a final opportunity to rule on the question if it was indeed raised at all. Rule 34 of the Montana Rules of Appellate Civil procedure permits a party to petition the Montana Supreme Court for a rehearing if it feels that" . . . some question decisive of the case, was overlooked by the court . . ." If the Passages squarely presented this issue to the Montana Supreme Court in the petition for rehearing and convinced the Court that the issue had been raised in the appeal, it is quite possible the Court would have granted a rehearing and decided the question. But the Passages failed to do so, and the result, now, is that there is no clear record indicating that the question was squarely raised in the Montana Supreme Court. And it is beyond question the question was never decided.

ARGUMENT

The Petitioners' contention seems to be fashioned out of

thin air. They at no time alleged they did not read the arbitration agreements. They at no time alleged they did not understand the arbitration agreements. And they at no time alleged they did not know what rights they were giving up by signing the agreements. Because of this we must assume they knew what they were doing. However, they are now asking this Court to rule straight across the board that to be enforceable under the National Arbitration act, all arbitration contracts must expressly set out all rights that are given up by submitting a dispute to arbitration. Even assuming some validity to this contention, this Court should refuse to hear the case of the merits because this issue was never squarely raised before the Montana trial court or before the Montana Supreme Court. As a result neither of these Courts ruled on this question.

At the trial court level neither Prudential-Bache nor the G.T. Murray & Co. defendants disscussed the question now before this Court. If the question was raised in the trial court it was so obscurely raised that neither the defendants nor the arbitration agreements can be enforced, the Montana trial court stated the issue as follows: "Whether a party to an agreement which includes an arbitration clause can be compelled to arbitrate issues arising under this state's securities laws, enen if such arbitration agreement violates the state's policy in opposition to enforcement of such an agreement?" (See Petitioners' Appendix B, at 14). The trial court's discussion of this issue immediately following the statement of this issue is barren of any mention of the question that Petitioners have raised before this Court in their Petition for a Writ of Certiorari.

The same is true of the proceedings before the Supreme Court of Montana. If the question was raised before the Montana Court it was done so obscurely that Prudential-Bache and the G.T. Murray & Co. defendants did not realize it had been raised. In their briefs raising the contracts of adhesion issue before the Montana Supreme Court the Passages in the table of contents to their brief state that "The arbitration Clauses in Question are Contracts of Adhesion and are thus Unenforceable." This identical language is repeated at page 7 of their brief where the Passages begin discussion of the contracts of adhesion

issue. Not until 5 pages later, at page 12 is there any suggestion that Passages are attacking the National Arbitration Act as being unconstitutional. The Passages declare: "as applied to the contracts in question, the National Arbitration Act is unconstitutional."

If this bare reference raised the question of constitutionality of the National Arbitration Act as applied to the contracts in question here, neither the opposing parties nor the Supreme Court of Montana realized that it had been raised. As a result, the opinion of the Supreme Court of Montana is similarly barren of any discussion of this issue--and most certainly the issue was not ruled upon.

In setting out the issue concerning the alleged adhesion contracts, the Supreme Court stated:"2. Are the arbitration agreements in this case adhesion contracts, and if so, are they enforceable." (See Petitioners' Appendix A, pp4-7). There is not one reference to any claim of the Passages that they were claiming the National Arbitration Act to be unconstitutional as applied or in any other way. The Supreme Court of Montana clearly did not rule on the issue. The question raised should not be heard on the merits because neither the Montana trial court nor the Montana Supreme Court ruled on the question raised in the Petition.

Under Rule 21 of this Court governing Petitions for a Writ of Certiorari, if is the burden of the Petitioners here to establish just how they raised the question in both the trial court and before the Montana Supreme Court. It is also their burden to establish precisely how both the trial court and the Montana Supreme Court ruled on the question for which review by this Court is sought. The Petitioners did not do so.

The petition does not even attempt to establish that the Montana trial court passed on the question for which review is now being sought. (See Petitioners' Petition, page 4). And though Petitioners attempt to establish that they raised the constitutional isue before the Montana Supreme Court (see Petitioners' Petition pages 4-5), they do not establish that the Montana Supreme Court ruled on the question presented her

In attempting to establish that the Montana Supreme Court ruled on the question the Petitioners attempt to summarize the holding by stating: "The Supreme Court of Montana found the arbitration clauses enforceable, noting that such classes are 'universal' and that there was no evidence the clauses were unconscionable." (Petitioners' Petition, at 5.) This summary fails to establish that the Montana Supreme Court ruled on the question presented in the Petition. Indisputably, the Montana Supreme Court did not rule on this question (see Appendix A to Petitioners' Petition, pp. 4-7).

Finally, we note that if the Petitioners thought they had raised the issue before the Montana Supreme Court, but that it had not been ruled upon, it was their right to petition the Montana Supreme Court for a rehearing under Rule 34 to seek a direct ruling on the issue raised. But the petitioners failed to do so. The result is that not only did the Montana Supreme Court not rule on the question presented to this Court, but the Petitioners failed to avail themselves of the opportunity to do so by filing a petition for rehearing.

Finally, we get to the question of whether the agreements to arbitrate are enforceable under the National Arbitration Act. In holding the contracts to be enforceable the trial court relied on **Southland v. Keating**, 465 U.S. 1 (1984) (See Appendix B to Petitioners' Petition, pp14-15), and the Montana Supreme Court also relied on the **Southland** decision (see Appendix A to Petitioners' Petition, pp 4-7.) In holding that the defendants were entitled to arbitration by invoking the National Arbitration Act, both the trial court and the Montana Supreme Court rejected any argument that the arbitration agreements were not enforceable because they were contracts of adhesion.

Though they do not say so in so many words, the Petitioners are apparently asking this Court to hold as a matter of law that an arbitration cannot be enforced under the National Arbitration Act unless the agreement expressly sets out the rights that are given up by submission of a dispute to arbitration. This position is untenable.

Petitioners argue that the National Arbitration Act is

unconstitutional as applied to them, but they are asking for a much broader ruling than this. In fact, it seems they would have to ask for a broader ruling if they were to obtain the benefit of any ruling at all. Neither in trial court nor before the Montana Supreme Court did the petitioners allege they did not read or understand the contracts they signed agreeing to arbitration. We must therefore assume they understood the effect of the arbitration clause unless the burden of proving the enforceability of an arbitration clause is placed on the party asking for the arbitration. Such a holding, however, would turn contract law on its ear. The burden under arbitration agreements should be the same as it is in other contract situations. If a party seeks to avoid a written contract term the burden should be on that party to prove its unenforceability.

The situation before this Court is that of parties who signed an arbitration agreement and they are sorry they did so. Their only argument now is that the agreements did not expressly tell them what rights they were giving up and therefore that the arbitration clauses are unenforceable. This position is untenable.

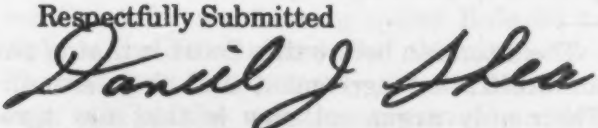
Based on these arguments we ask this Court to deny the Petition for Certiorari.

CONCLUSION

This Court should deny the petition for a writ of certiorari. The question raised here fails to comply with the Requirements of Rule 21 of this Court because the issue, if raised at all, was not properly raised in either the Montana trial court or before the Montana Supreme Court. Neither of these courts decided the question that is presented to this Court.

This Court should also deny the petition for a writ of certiorari because it fails to raise a substantial federal question.

Respectfully Submitted



DANIEL J. SHEA
Attorney for Prudential-Bache Inc.,
800 Broadway
Helena, Montana 59601

CERTIFICATE OF SERVICE

I, Daniel J. Shea, certify that on this 17 day of January, 1987, I personally served three copies of the Brief of Respondent Prudential-Bache Inc., in Opposition to Petition for Writ of Certiorari, on the following:

Mr. William Leaphart, Leaphart Law Firm, 1 North Last Chance Gulch, Helena, Montana 59601, Counsel for Petitioners;

Mr. Michael J. Mulroney, Luxan & Murfitt, Fourth Floor, Montana Club Building, P.O. Box 1144, Helena, Montana 59604, Counsel for Respondents G.T. Murray & Co., et al.

I further certify that all parties requred to be served have been served.

Daniel J. Shea

DANIEL J. SHEA